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[2018] MLJU 1919

Kuasatek (M) Sdn Bhd v HCM Engineering Sdn Bhd and other appeals

HIGH COURT (KUALA LUMPUR)
LEE SWEE SENG J
ORIGINATING SUMMONS NOS WA-24C-161-08 OF 2018, WA-24C-164-08 OF 2018 AND WA-24C-165-08 OF 2018
28 December 2018

James Ding (Ng Si Seng with him) (SS Ng & Lim) for the in OS No WA-24C-161-08 of 2018 for the plaintiff.

*Ben Lee Kam Foo (**Victor Pang Chee Siong** with him) (Gan & Zul) in OS No WA-24C-164-08 of 2018 for the plaintiff.*

*Ben Lee Kam Foo (**Victor Pang Chee Siong** with him) (Gan & Zul) in OS No WA-24C-165-08 of 2018 for the plaintiff.*

*Ben Lee Kam Foo (**Victor Pang Chee Siong** with him) (Gan & Zul) in OS No WA-24C-161-08 of 2018 for the defendant.*

James Ding (Ng Si Seng with him) (SS Ng & Lim) for the in OS No WA-24C-164-08 of 2018 for the defendant.

James Ding (Ng Si Seng with him) (SS Ng & Lim) for the in OS No WA-24C-165-08 of 2018 for the defendant.

Lee Swee Seng J:

[1] Kuasatek Sdn Bhd ("Kuasatek") had filed an application for enforcement of an Adjudication Decision dated 4.7.2018 under Section 28 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") against HCM Engineering Sdn Bhd ("HCM") (Enforcement Application).

[2] HCM had subsequently filed an application to set aside the Adjudication Decision pursuant to Section 15(b) and 15(d) of the CIPAA (Setting Aside Application) and another application to stay the Adjudication Decision (Stay Application).

[3] All the three applications by way of three separate Originating Summonses were heard together for they share the same substratum of facts and the issues straddle one another.

[4] The parties are shall be referred to as Kuasatek or Claimant and HCM or Respondent as they were so referred to in the Adjudication so as to avoid confusion and for consistency.

Project

[5] HCM had appointed Kuasatek as the sub-contractor for a project known as "*The Design and Built Contract for the Proposed Addition of a 4 Storey Office Building With Basement Car Parking to the Existing Facilities on Lot No. 38627 and Lot No. 36462, Bukit Jalil, Mukim Petaling, Daerah Kuala Lumpur Malaysia for the Asian Football Confederation*" for the Contract Sum of RM9,500,000.00.

[6] The said appointment was *vide* a Letter of Appointment ("LA") for Mechanical and Electrical Works Packages ("the

Works") dated 15.3.2016.

Problem

[7] Disputes arose with respect to the Claimant's final claim in the form of Final Account submitted to the Respondent on 22.12.2017. In the Final Account, the Claimant had claimed from the Respondent the sum of RM3,085,504.91, based on the Contract Sum of RM11.5 Million.

[8] The Respondent said this is contrary to the Progress Claims submitted by the Claimant which all along were based on the contract sum stated in the said LA, being RM9.5 Million.

[9] The Respondent submitted that the Bills of Quantities for the contract for the sum of RM11.5 Million is based on different rate or price as compared to the said LA for the sum of RM9.5 Million.

[10] On 30.1.2018, the Claimant had *vide* their Solicitors served a Payment Claim dated 30.1.2018 on the Respondent pursuant to Section 5 of the CIPAA. In the said Payment Claim, the Claimant had claimed the sum of RM3,085,504.91 from the Respondent. The Respondent did not serve any Payment Response.

Proceedings in Adjudication

[11] The Claimant followed through with the service of a Notice of Adjudication and subsequently after the appointment of the Adjudicator, the Claimant served their Adjudication Claim and the Respondent their Adjudication Response. The Claimant then served their Adjudication Reply.

[12] The Adjudicator appointed had on 4.7.2018, handed down his Adjudication Decision allowing part of the Claimant's Claim as follows:

> "The Respondent shall within 14 days from the date of this Decision pay to the Claimant:
>
> (a) the sum of RM2,959,490.44;
> (b) interest at 5% per annum on RM2,758,156.61 from 22.1.2018 until the date of full payment;
> (c) the adjudication cost of RM40,000.00; and
> (d) the Adjudicator's fee of RM41,114.43 together with 6% GST of RM2,446.87, the AIAC administrative fee of RM8,222.90 together with 6% GST of RM493.40, the cost of registering the adjudication of RM265.00 and the cost of appointing the Adjudicator of RM489.00.

Prayers

[13] In the Setting Aside Application the Respondent had invoked section 15 (b) and (d) of the CIPAA on the ground that there had been a denial of natural justice and that the Adjudicator had acted in excess of his jurisdiction.

[14] It was argued by the Respondent that the Adjudicator had gone off on a frolic of his own when he decided that the value of work done is RM10,921,219.00 and by so doing there had been a substantial denial of natural justice to the Respondent and consequently he had also exceeded his jurisdiction by deciding on what was not argued.

[15] The Respondent also contended that the Adjudicator had acted in excess of his jurisdiction to allow claims for the Alleged Re-Engineering Works Proposal and Finance Charges.

[16] Based on the above grounds the Respondent sought to persuade the Court that the Setting Aside should be allowed or at the very least the Decision should be stayed and that the Enforcement Application should be dismissed.

Principles

[17] It must be stated at the outset that an application to set aside an Adjudication Decision is not an appeal and the Court will not be reviewing the finding of facts and the interpretation of law placed on those findings unless it goes towards jurisdiction.

[18] Therefore if a matter is within the jurisdiction of the Adjudicator it does not become one that the Adjudicator has exceeded his jurisdiction merely because he had come to a finding of fact that a party does not agree with or that his interpretation of the law is flawed or faulty.

[19] As is often pointed out it is not a cause for the Court to interfere if the Adjudicator has asked himself the right question but that he has arrived at the wrong answer. That correction would have to await the trial or arbitration depending on whether or not there is an arbitration agreement. It is only when the Adjudicator has asked the wrong question that the Court would interfere. See the UK Court of Appeal decisions in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041,; 73 ConLR 135,; [2000] BLR 522 and *C & B Scene Concept Design Ltd v Isobars Ltd* [2002] EWCA Civ 46,; 82 ConLR 154,; [2002] BLR 93.

[20] Based on the test as expounded by the Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings Berhad* [2018] 2 MLJ 22, if there is a clear, obvious and unequivocal error, then the Court might be prepared to grant a stay of the Adjudication Decision pending a full resolution of it at trial or arbitration.

[21] In *PWC Corporation Sdn Bhd v Ireka Engineering & Construction Sdn Bhd & Other Case (No. 2)* [2018] 1 LNS 163 the Court followed the exposition of the law on the meaning of denial of natural justice in the context of Statutory Adjudication in *Cantillon Ltd v. Urvasco Ltd* [2008] EWHC 282 (TCC) as follows:

> "[33] Learned counsel for Ireka submitted that the Malaysian Courts have consistently followed the guideline in relation to denial of natural justice in adjudication cases as enunciated in *Cantillon Ltd v. Urvasco Ltd* [2008] EWHC 282 (TCC); paragraph [57], as follows:
>
> > "[57] From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:
> >
> > (a) It must first be established that the adjudicator failed to apply the rules of natural justice;
> > (b) Any breach of the rules must be more than peripheral; they must be material breaches;
> > (c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant;
> > (d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree;
> > (e) **It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction Company Ltd v. The Camden Borough of Lambeth* was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.** (emphasis added)

[22] As for a jurisdictional challenge to an Adjudication Decision there are different ways of looking at it and the Federal Court in **View Esteem** (supra) observed as follows:

"16. The term "jurisdiction" under CIPAA is not used in the administrative or public law sense but in relation to matters within the scope of CIPAA. On this point, in *Terminal Perintis Sdn. Bhd. v. Tan Ngee Hong Construction Sdn. Bhd. & Anor.* [2017] MLJU 242, Lee Swee Seng J. observed as follows (at para [70]):

> "In the application of our CIPAA, we are free from the shackles of the language of administrative law and judicial review. The word 'jurisdiction' is used in section 15(d) as in the Adjudicator having acted in 'excess of his jurisdiction' as a ground for setting aside an Adjudication Decision. It is also used in section 27(1) with respect to an Adjudicator's jurisdiction being limited to the matters raised in the Payment Claim and the Payment Response. Then there is a reference to it in section 27(2) with respect to extending his jurisdiction by way of agreement in writing to deal with matters not specifically raised in the Payment Claim and Payment Response. Finally there is the reference to a 'jurisdictional' challenge, which when raised, does not prevent the Adjudicator from proceeding and completing the Adjudication without prejudice to the rights of any party to set it aside under section 15 or to oppose its enforcement under section 28 ... ... Issues as to whether there is a valid cause of action, does not go towards jurisdiction but rather to the merits of the claim..."

17. The learned judge also made note of the various types of jurisdictional complaints within CIPAA which may be categorized as **core jurisdiction, competence jurisdiction and contingent jurisdiction**. The common feature in all of them is the presupposition that CIPAA applies to determine if the adjudicator had kept within his jurisdiction."(emphasis added)

[23] The High Court in *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] MLJU 242,; [2017] 1 LNS 177, distinguished between the different types of jurisdictions as follows:

"[71] There are many senses in which the word "jurisdiction" may be understood. We need only to differentiate between core jurisdiction, competence jurisdiction and contingent jurisdiction.

[72] Core jurisdiction would be the question of whether the subject matter of the dispute is one which the Act has conferred on the Adjudicator. Thus if a contract is not a construction contract, but a shipping or mining contract or a contract for legal fees with respect to advice given in construction contract, or that the contract is with respect to construction of a dwelling house for a natural person, then this Court will interfere if the Adjudicator got it wrong. It is a case where the Adjudicator has no jurisdiction to begin with. So too if the construction contract is carried out wholly outside Malaysia.

[73] If it is a question of the competence of the Adjudicator as in he has not been properly appointed in that what purported to be a Payment Claim, is not on the face of it a Payment Claim or that the Payment Claim was not served or that it was not expressly stated as a claim made under CIPAA, then this Court would be at liberty to set aside the Adjudication Decision on ground of excess of jurisdiction. This is not only because the Adjudicator cannot decide on his own competence or capacity to adjudicate when the very validity of his appointment is questioned but also that it is part of the legislative intent that if there is non-compliance with a basic and essential requirement of CIPAA with respect to a Payment Claim under Section 5, then the Adjudication Proceedings and the Decision made would be a nullity.

[74] In a case of contingent jurisdiction, it would be a case where for there to be jurisdiction, there must be further compliance with the requirements of the Act as in that the dispute must be one falling within the matters raised in the Payment Claim and the Payment Response as provided for under section 27(1) CIPAA. In that example the word "jurisdiction" is used in the sense of the scope of the dispute that is before the Adjudicator for decision....."

[24] Judging by the way the jurisdictional challenge is framed it appears that the Respondent is proceeding on the fact of an excess of contingent jurisdiction in that the matter decided upon must be within the scope of reference in the Payment Claim or at least raised in the Adjudication Claim and Adjudication Response and also the Adjudication Reply that was served.

Whether there had been a denial of justice and an acting in excess of his jurisdiction when the Adjudicator decided that the value of work done is RM10,921,219.00

[25] Learned counsel for the Respondent submitted that the Adjudicator had gone off on a frolic of his own to decide that the contract sum applicable is RM10,921,219.00, which was neither the Claimant's nor the Respondent's argued case.

[26] In the Payment Claim served by the Claimant, it was stated that RM9.5 Million is the Original Contract Sum whereas RM11.5 Million is the Revised Contract Sum. The Claimant further asserted that the re- measurement of work is amounting to RM10,921,219.00, based on the Bill of Quantities to the LA. For ease of reference, the material part of the Payment Claim is reproduced as follow:

Description of Work / Services & Amount (RM)			
Original Contract Sum			RM 9,500,000.00
Revised Contract Sum			RM 11,500,000.00
	Add	**Omit**	
Remeasurement of Works	RM 10,921,219.00	RM 11,500,000.00	(578,781.00)
Work Order and variations			
Work Order	RM343,077.00		
Cost of Production of Re-engineering works proposal	RM30,000.00		
Sub-total	RM373,077.00		RM373,077.00
Loss & Expenses			
Finance Charges	RM37,348.30		
Preparation of Documents	RM50,000.00		
Claim Consultant's Fees	RM230,000.00		
Sub-total	RM337,348.30		RM337,348.30
		Final Contract Sum	**RM11,631,644.30**
Less:			
Retention @ 2.5% of Original Contract Sum			(237,500.00)
Previous Payments			
Payment under interim progress claim		RM 8,029,962.39	
Direct Payment for Work Order		RM278,677.00	
Sub-total		RM 8,308,639.39	(RM8,308,639.39)
AMOUNT CLAIMED	**RM3,085,504.91**		
6% GST	185,130.29		
TOTAL	**3,270,635.20**		

[27] Learned counsel for the Respondent pointed out that in the Adjudication Claim served, the Claimant had asserted the following:

a) At paragraph 7 of the said Adjudication Claim, the Claimant alleged that the Contract Sum of RM9.5 Million in the said LA was accepted by the Claimant on the condition that the Respondent was to undertake re-engineering exercise for all the M&E Works. Otherwise, the consideration for the M&E Works was RM11.5 Million [see page 333 of Exhibit KMW-6 in the Respondent's Affidavit in Support ("AIS")];

b) The Claimant had relied on the following events in the formation of the contract:
   i) On 27th February 2015, the Claimant submitted their tender (Ref: KMSB/TENDER/100/2-2015/HCM) for the sum of RM13,043,986.00 (see page 369 to 371 of Exhibit KMW-6 in the Respondent's AIS);
   ii) On 15th May 2015, the Claimant submitted their revised tender (Ref: KMSB/TENDER/106/5-2015/HCM) for the total sum of RM11,800,000.00 comprising of the following:
      a) RM7,820,000.00 for electrical works;
      b) RM3,980,000.00 for mechanical works.

      See page 373 of Exhibit KMW-6 in the Respondent's AIS;
   iii) On 7th October 2015, the Claimant submitted the tender (Ref: KMSB/PRJ/1011/10-2015/HCM) which comprise of: -
      aa) **Option 1** of RM11,500,000.00 based on the full specifications as specified by the Employer, Asian Football Confederation;
      bb) **Option 2** of RM10,908,036.00 based on 70% compliance with the specifications provided whilst 30% to be changed to a different, but approved, equivalent brands of material. The Respondent undertake the responsibility to convince and prove to the consultant of their acceptability.

   See page 375 of Exhibit KMW-6 in the Respondent's AIS.

c) At paragraph 8(v) of the said Adjudication Claim, the Claimant had made the following allegations that:
   i) The Respondent had opted for Option 2 but wanted the Contract Price to be stated at RM9,500,000.00;
   ii) That the Claimant had informed the Respondent that they were unable to undertake the M&E Works below RM10,908,036.00 unless they were given the re- engineering exercise of the M&E Works to which the Respondent agreed.

d) The Claimant further asserted that the Claimant was not awarded the re-engineering works despite the Claimant having prepared the re-engineering works proposal drawings and there was no substantial brand change (See page 385 of Exhibit KMW-6 in Respondent's AIS).

e) Accordingly, the Claimant relied back on Option 1 of RM11,500,000.00 in the Adjudication Proceeding (see paragraph 8(vii)(b), at page 336 of Exhibit KMW-6 in the Respondent's AIS);

f) In alternative, the Claimant had asserted that the said LA agreed upon was on a "re-measurement basis". The Claimant contended in paragraph 20 of the said Adjudication Claim that the works having been re-measured were valued at RM10,921,219.00. The detailed breakdown and a summary of the Bill of Quantities are attached in Appendix 15 of the Adjudication Claim, at page 791 to 863 of Exhibit KMW-6 in the Respondent's AIS.

[28] Learned counsel for the Respondent submitted that the following can be observed from the clear documents submitted by the Claimant in the adjudication proceeding:

a) The Claimant's allegation that the Respondent had opted for Option 2 for the sum of RM10,908,036.00, with re-engineering works but wanted the Contract Price to be stated at RM9.5 Million is unsubstantiated by proof;

b) the Claimant alleged that the said LA was issued based on the understanding that the Respondent had opted for option 2 stated in the letter dated 7.10.2015, with the Bills of Quantities for option 2 (see page 375 of Respondent's AIS);

c) Following the rejection of the re-engineering works, the Claimant had by a letter dated 25.10.2016 to the Respondent, sought to re-include the Preliminaries amounting to RM350,000.00, so that the revised contract sum would become RM9.85 Million. The Claimant had also submitted the proposed

rationalization of prices totaling to RM9.85 Million to the Respondent (see page 385 to 386 in Exhibit KMW-6 of the Respondent's AIS). This is contrary to what was asserted by the Claimant that the contract should be for RM11.5 Million;

d) At all material time, the contract based on Option 1 for the sum of RM11.5 Million quoted in the letter dated 7.10.2015 had been deserted by the Claimant and the said Option 1 is no longer on the table;

e) However, the Claimant in the purported Final Account and subsequently, in the adjudication proceeding sought to rely on Option 1 to state that the Contract Sum is for RM11.5 Million. At all material time, the alleged contract for the sum of RM11.5 Million had never been agreed by the parties and there was no Bill of Quantities for the sum of RM11.5 Million when the said LA was issued.

[29] Learned counsel for the Respondent submitted that it had always been the Respondent's case that the contract was for the sum of RM9.5 Million and there was no written contract for the alleged sum of RM11.5 Million. The allegation is inconsistent with the contemporaneous documents (see paragraph 35, at page 916 of Exhibit KMW-7 in the Respondent's AIS). The Respondent had relied on the chronology of events, particularly the following to show that the allegation is unsustainable:

a) Letter dated 25.10.2016 (see page 1068 of Exhibit KMW-7 in the Respondent AIS) which showed that subsequent to the rejection of any re-engineering work, the Claimant has sought to re-include the sum of RM350,000.00. Nothing was said about the alleged contract for the sum of RM11.5 Million;

b) As at 30.6.2017, the Claimant had submitted all Progress Claims based on the contract sum of RM9.5 Million (see page 1750 of Exhibit KMW-7 in the Respondent's AIS);

c) The Claimant only alleged the contract sum of RM11.5 Million in the purported Final Account dated 22.12.2017 (see page 140 of Exhibit KMW-3 in the Applicant's AIS).

[30] The Adjudicator, based on the competing submissions of the parties, had arrived at the following findings:

a) At paragraph 108 of the Adjudication Decision (see page 34 of the Respondent's AIS), the Adjudicator found that from the documentary trail, the Claimant had revised the pricing to RM9.5 Million via letter dated 7.10.2015, and the Tax Invoice by the Claimant was also based on RM9.5 Million. In the same paragraph, the Adjudicator had also found that the said LA reflected the contract sum of RM9.5 Million "*or such other sum may be ascertained in accordance with the Conditions of Contract*";

b) At paragraph 109 of the Adjudication Decision (see page 34 of the Respondent's AIS), the Adjudicator found that as per the Payment Claim and the Adjudication Claim, the computation of the amount claimed is based on the re-ameasured amount of RM10,921,219.00 and not RM11,500,000.00;

c) At paragraph 112 of the Adjudication Decision (see page 35 of the Respondent's AIS), the Adjudicator had made a finding that the Claimant is not basing their claim on RM11,500,000.00, but on the re-measured sum of RM10,921,219.00;

d) At paragraph 114 of the Adjudication Decision (see page 36 of the Respondent's AIS), the Adjudicator had arrived with the decision that the applicable contract amount between the parties should be RM10,921,219.00.

[31] However it would not be fair to then say that he had gone off on a frolic of his own merely because he had accepted neither the sum conceded by the Respondent nor the sum claimed by the Claimant in the main claim but instead had accepted the Claimant's alternative claim based on a re-measurement claim. The Adjudicator had made a finding of fact as follows based on the evidence before him at paragraphs 109 and 112 of the Adjudication Decision as follows:

> "109. As per the Payment Claim, and the Adjudication Claim, the computation is based on the re-measurement amount of RM 10,921,219.00 (as detailed in BQ calculations), and not RM11,500,000.00.....
>
> 112. Back to the issue of the Contract Sum. **It is noted that the Claimant is not basing their claim on RM11.5 million, but on the re-measured RM10,921,219.00. I observe that the re-measured sum of RM10,921,219.00 at page 420 (CBD 3, Appendix 15) is supported by the detailed BQ, and every Item from A to I are individually supported by the BQ breakdown -**

> **appearing from Pages 421 to 492 of CBD 3.** In this regard, for the Respondent to contend that there is no BQ in the LA (para 45 (c) Adjudication Response) is indeed unfounded - especially given that Appendix A (Respondent's Vol. 1, page 10) of the LA had clearly provided for the summary of the BQ." (emphasis added)

[32] It was clear to the Adjudicator that the Respondent had rejected the Claimant's re-engineering proposal and so the contract sum of RM9.5 million no longer applied.

[33] Though the Claimant had asserted that they should then be entitled to the Contract sum in Option 1 of RM11.5 million, the Adjudicator disagreed. It was also clear to the Adjudicator that the value stated in the LA of RM9.5 million did not reflect the actual work done by the Claimant in the Project.

[34] The Adjudicator reminded himself that Parties had already agreed to this mechanism of price adjustment in paragraph 1 of the LA should the pre-engineering proposal by the Claimant was rejected and it was rejected by the Employer. It reads:

> "1.0 AGREED PRICE
>
> 1. In consideration of Kuasatek (M) Sdn Bhd (Company No: 112253- X) (hereafter referred to as The Sub-Contractor) to carry out the above mentioned works, HCM ENGINEERING SDN BHD agree to pay Kuasatek (M) Sdn Bhd the sum of RM9,500,000.00 (Ringgit Malaysia: Nine Million Five Hundred Thousand only) excluding 6% GST or **such other sum may be ascertained in accordance with the Conditions of Contract**." (emphasis added)

[35] The words in bold are not for decorative purpose or to introduce uncertainty but rather to cater for a situation already contemplated in the event the re-engineering proposals were rejected by the Employer.

[36] It was in that context that the Adjudicator decided that the contract is a "re-measurement contract" and based on the Claimant's re-measurement supported by the BQ, the final amount arrived at was RM10,921,219.00 after taking into consideration the omission of works.

[37] That was the alternative claim which the Claimant settled for and indeed had asserted that the said LA agreed upon was on a "re- measurement basis". See paragraph 15 and 27 of the Adjudication Decision.

[38] It was the Claimant who contended in paragraph 20 of the said Adjudication Claim that the works having been re-measured were valued at RM10,921,219.00. The detailed breakdown and a summary of the Bill of Quantities are attached in Appendix 15 of the Adjudication Claim and the BQ was produced at pages 420-491 of the Adjudication Claim. In fact the LA expressly states at paragraph 1.2 that "The breakdowns of the above sum are in accordance with the Bills of Quantities in Appendix A to this Letter."

[39] The Adjudicator had before him 3 positions that the parties had submitted on which is whether the sum claimed should be based on the Option 1 Contract sum of RM11.5 million, or the sum stated in the LA of RM9.5 million or the re-measured sum of RM10,921,219.00. See the heading just before paragraph 107 of the Decision which reads:

> "Whether the Contract sum should be RM9,500,000.00 or RM10,921,219.00 or RM11,500,000.00."

[40] The above are clear findings of fact and law and even if the Adjudicator should have held that the contract is a lump sum contract of RM9.5 million, that would not be a basis for setting aside the Adjudication Decision. Suffice to say that natural justice does not mandate the Adjudicator to agree with the Respondent's contention. All that natural justice requires is that the Adjudicator hears both sides and considers the evidence presented by both sides and gives his reasons for his Decision.

[41] One may disagree with his reasons but that cannot be the subject of a setting aside based on a denial of natural

justice.

[42] In *PWC Corporation Sdn Bhd v Ireka Engineering & Construction Sdn Bhd & other case (No. 2)* [2018] 1 LNS 163 **it was** held as follows:

> "[33] ...It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction Company Ltd v. The Camden Borough of Lambeth* was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto"

[43] The Court of Appeal spoke of the legal threshold of "natural justice" where in *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776 it held as follows:-

> "[19] When one speaks of natural justice, it is nothing more than what we call **the concept of "procedural fairness" which needs to be accorded to the parties in a dispute of a hearing**. In this appeal the Appellant's complaint on the breach of natural justice is contained in pages 15 - 19 of his written submission. We informed counsel for the Appellant that it appeared that his complaint about the decision of the adjudicator related substantially to the manner in which the adjudicator arrived at his decision after evaluating the evidence provided to him and that would only be questioning the findings of fact by the adjudicator."
>
> ....
>
> " [21] There were no complaints by the Appellant that the adjudicator had got the disputes on a completely wrong footing. In fact, no complaint was made at all and the adjudication process was carried out premised on those issues. If we were to consider the complaints of the Appellant, we would be looking into the merits of the decision of the adjudicator. **In the context of** section 15 of CIPPA 2012**, it cannot be the function of the Court to look into or review the merits of the case or to decide the facts of the case. The facts are for the adjudicator to assess and decide on. The Court's function is simply to look at the manner in which the adjudicator conducted the hearing and whether he had committed an error of law during that process.** Such error of law relates to whether he had accorded procedural fairness to the Appellant. In the context of this case, the complaints of the Appellant were nothing but complaints of factual findings of the adjudicator which in our view cannot be entertained by us." (emphasis added)

[44] The issue was clearly stated as a matter for the Adjudicator to decide and it cannot be a case where by deciding not to the satisfaction of the Respondent then he is said to have exceeded his jurisdiction.

[45] This is not a case of the Adjudicator rewriting the contract for the parties but one where he is confronted with opposing claims from the parties and he had to decide on whether the Claimant's main claim based on RM11.5 million or the alternative claim based RM10,921,219.00 on a re- measurement basis or the Respondent's position that the contract is a lump sum for RM9.5 million. The Respondent in their Adjudication Response had submitted on the positions taken by the Claimant and maintained that the contract was for a lump sum of RM9.5m and that there is no room for re- measurement because there was no BQ.

[46] The Adjudicator found this assertion of no BQ to be unfounded and held that it is found at Appendix A (Respondent's Vol. 1, page 10) of the LA where it had clearly provided for the summary of the BQ.

[47] In the case of *Joinery Plus Ltd (in administration) v Laing Ltd* [2003] EWHC 213 (TCC) Judge Anthony Thornton QC stated succinctly the principles of law with respect to an error of law which may go towards jurisdiction as follows:

> "[51] The effect of the relevant decisions relating to errors by an adjudicator is as follows: (1) The precise question giving rise to the dispute that has been referred to the adjudicator must be identified. (2) If the adjudicator has answered that referred question, even if erroneously or in the wrong way, the resulting decision is both valid and enforceable. If, on the other hand, the adjudicator has answered the wrong question, the resulting decision is a nullity. **(3) In determining whether the error is within jurisdiction or is so great that it led to the wrong question being asked and to the decision being a nullity, the court should give a fair,**

> **natural and sensible interpretation to the decision and, where there are reasons, to the reasons in the light of the disputes that are the subject of the reference**. The court should bear in mind the speedy nature of the adjudication process which means that mistakes will inevitably occur. **Overall, the court should guard against characterising a mistaken answer to an issue that lies within the scope of the reference as an excess of jurisdiction.** (4) A mistake which amounts to a slip in the drafting of the reasons may be corrected by the adjudicator within a reasonable time but this is a limited power that does not extend to jurisdictional errors or errors of law. (5) In deciding whether an error goes to jurisdiction, it is pertinent to ask whether the error was relevant to the decision and whether it caused any prejudice to either party. (**6) A wrong decision as to whether certain contract clauses applied; or whether they had been superseded by the statutory scheme for adjudication; or as to whether a particular sum should be evaluated as part of, or should be included in the arithmetical computation of, the final contract sum in a dispute as to what the final contract sum was do not go to jurisdiction.** (7) However, where the claim that was considered by the adjudicator was significantly different in its factual detail from the claim previously disputed and referred, the resulting decision was one made by reference to something not referred, was without jurisdiction and was unenforceable since the adjudicator had asked and answered the wrong question." (emphasis added)

[48] I am in full agreement with the position of law stated in the above case and here the issue was very much at play and the parties have submitted on the positions they had taken. The right questions had been asked and even if the wrong answer had been given, that is to be corrected and set right in the arbitration or trial.

[49] Likewise learned counsel for the Respondent submitted that the Adjudicator had acted in excess of his jurisdiction in granting the following claims, categorized by the Claimant as "loss and expenses" in the Payment Claim:

a) At paragraphs 124, 125 and 126 of the Adjudication Decision, the Adjudicator had allowed the alleged costs for preparing and producing the re-engineering works drawings for the sum RM30,000.00;
b) At paragraphs 127, 128 and 129 of the Adjudication Decision, the Adjudicator had allowed part of the Finance Charges amounting to RM35,844.43 by invoking section 25(o) of CIPAA 2012 despite the Adjudicator has expressly acknowledged that there is no provision as to contractual interest in the Contract.

[50] I do not see it as a matter that goes towards jurisdiction as the Claimant's overall claim is within the jurisdiction of the Adjudicator. Some heads of claim may perhaps not be claimable as it may not strictly speaking fall within the meaning of "payment" defined in section 4 of the CIPAA which defines "Payment" as follows:

> "Payment" means a payment for work done or services rendered under the express terms of a construction contract."

[51] The fact that some heads of claim and here it is a relatively small sum of RM60,844.43 may not be under an express terms of a contract would not cause the whole of the Adjudication Decision to be set aside for lack of jurisdiction.

[52] As for the Finance Charges these are not provided for in the LA and the Conditions of Contract where both documents are silent on the interest component and the rate of interest. Finance Charges must first be provided for in the contract in question before a claim may be made as it appears to be an exception to the strict meaning of a "payment".

[53] In the case of *Syarikat Bina Darul Aman Bhd & Anor v Government of Malaysia* [2017] MLJU 673 it was observed as follows:

> "[84] I have no problem associating with and adopting the views expressed by the two seminal books on adjudication in Malaysia. Based on the principles enunciated above, there is no good reason why payments pertaining to "loss and expense claims" due to the delay in completion of works cannot come within the ambit of CIPAA. **Indeed, "payment" under** s. 4 CIPAA **means "a payment for work done or services rendered under the express terms of a construction contract**." **Clauses 44 and 48(a) of the PWD 203A Standard Forms of Contract are the express terms under which the payment claim was made." (emphasis added)**

[54] As no submission was made on whether a severance should be allowed to sever this part of the amount allowed from the rest, I would consider whether this is a fit case for a stay on the ground of a clear, obvious or unequivocal error on the part of the Adjudicator.

Whether there should be a stay of the Adjudication Decision

[55] There is also the argument for stay but there is no evidence of the Claimant's impecuniosity or that they would not be able to pay back when it is sought to be enforced in a court's decision or Arbitral Award in favour of the Respondent.

[56] The only ground for the Respondent asking for a stay of the Decision is that they had served a Notice to Arbitrate on the Claimant. That is just merely meeting the threshold condition for stay as stated in *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* [2015] 11 MLJ 818.

[57] If at all there is any clear and obvious error, it is only narrowly confined to the combined items of financial charges and preparation of documents and research - under loss and expense - amounting to RM60,884.43 which does not appear to be an agreed head of claim in the contract in that there is no express terms in the contract providing for those claims.

[58] The test as modified by the Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 is where there is a clear, obvious and unequivocal error on the part of the Adjudicator as follows:

> "[79].....Section 16 of CIPAA should be treated as one of the safeguards to a likely wrongful adjudication decision and which empowers the court to find a suitable middle ground in cases where there has been **clear and unequivocal errors.**
>
> .....
>
> [81] .....It therefore makes sense that applications for stay in other jurisdictions are rarely granted. We are of the view that it is however not right to rely on those decisions to justify restricting the statutory power of stay in Malaysia simply on the financial status of the other party. The CIPAA contains no such restrictions.
>
> [82] We are in agreement with the contention of the appellant that a more liberal reading of s 16 of the CIPAA would allow **some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case. It is accepted that a stay of the award ought not be given readily and caution must be exercised when doing so.**..." (emphasis added)

[59] The only justification then for a stay of the Adjudication Decision is with respect to the claim for costs for preparing and producing the re- engineering works drawings for the sum RM30,000.00 and the Finance charges amounting to RM35,844.43 for there are no provisions under the express terms of the construction contract for such payments to be made. There is no provision to say that these "loss and expense" claim may be added to the contract sum or to the claim in the Final Account. See the case of *Syarikat Bina Darul Aman Bhd & Anor v Government of Malaysia* [2017] MLJU 673.

[60] The claims under both heads under Statutory Adjudication under the CIPAA may be said to be a clear and unequivocal error.

[61] I would exercise my discretion and grant a stay of the Adjudication Decision only with respect to the sum of RM65,884.43 arising from the claim for re-engineering works drawings for the sum RM30,000.00 and the Finance charges amounting to RM35,844.43.

Pronouncement

[62] In the light of the reasons given I had dismissed the Setting Aside Application and allowed a Stay of the Adjudication Decision only for the above sum of RM65,884.43. Correspondingly the Enforcement Application was allowed with a stay of the sum of RM60,884.43.

[63] As for costs, after hearing the parties, I had allowed RM5,000.00 each for the Setting Aside Application and the Enforcement Application in favour of the Claimant and a sum of RM3,000.00 for the Stay Application in favour of the Claimant.